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7
8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

10
11 JOSE ANTONIO GARCIA,

12 Plaintiff,

13 v.

14 COUNTY OF ALAMEDA, and YESENIA
SANCHEZ, Sheriff of Alameda County, in her
15 official capacity,

16 Defendants.

Case No. 3:24-cv-03997-RS

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
INJUNCTION**

Date: September 5, 2024

Time: 1:30 p.m.

Judge: Honorable Richard Seeborg

Ctrm: Courtroom 3 – 17th Floor

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NOTICE OF MOTION AND MOTION

TO THE COURT, DEFENDANTS, AND ALL COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on September 5, 2024 at 1:30 p.m., or as soon thereafter as the matter can be heard before the Honorable Richard Seeborg, in Courtroom 3 on the 17th Floor of the San Francisco Division of the above-captioned court, Plaintiff Jose Antonio Garcia¹ will and hereby does move this Court to grant a preliminary injunction to enjoin Defendants and their officers, agents, servants, employees, attorneys, and anyone in active concert or participation with any of the foregoing persons (collectively, “County”) from enforcing Alameda County Ordinance No. 2023-31 (“Ordinance”), codified at Chapter 10.40 of the Alameda County Code, against Feroso in his capacity as a reporter. The Motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the supporting declarations and exhibits thereto, all pleading and papers filed in this action, and such additional papers and arguments as may be presented at or in connection with the hearing.

Feroso seeks a preliminary injunction prohibiting the County from enforcing the Ordinance against him for observing, recording, or reporting on sideshows or related preparations in his capacity as a reporter. The requested injunction would prohibit the County from citing, detaining, arresting, or seeking prosecution of Feroso for an alleged violation of the Ordinance arising from his work as a reporter.

¹ Garcia writes under his maternal family surname, “Jose Feroso,” and will be referred to by this professional pen name in the remainder of the notice of motion, motion, and memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. ISSUE PRESENTED

Should the Court grant a preliminary injunction prohibiting the County from enforcing the Ordinance against Feroso in his capacity as a reporter because he is likely to prevail on his claim that as applied to him the Ordinance is a content-based restriction on speech that violates the First Amendment by criminalizing journalism on matters of public concern?

II. INTRODUCTION

Journalism is not a crime, yet the Ordinance makes it unlawful to observe, record, and report news of public concern. This Court’s intervention is necessary to protect the First Amendment right to gather news and inform the public.

Jose Feroso is the road safety beat reporter for *The Oaklandside*. To perform his job effectively, he needs to cover sideshows—controversial events where drivers take over intersections with their cars as they skid in circles while performing stunts. Previously, he has interviewed residents and business owners who are affected by the sideshows, detailed efforts to curb sideshows through enforcement and traffic safety measures, and performed data analysis to map sideshow hotspots. But Feroso’s readers need and want more firsthand news on sideshows to understand what is happening in their communities and make informed decisions about reforms.

Yet, in Alameda County, the Ordinance criminalizes the mere observation of “Sideshow Events” occurring on public streets. By punishing observation of sideshows, it inherently prohibits recording or reporting on them, but it does not prevent recording or reporting on other events or matters at the same time and place. Therefore, the Ordinance unconstitutionally punishes protected speech based on its content. Existing laws already prohibit reckless driving and other dangerous activities that often occur at sideshows. As other jurisdictions have done, the County could have bolstered enforcement of those laws or adopted an ordinance aimed at the promoters or organizers of sideshows, but this Ordinance does not do that. Instead, it criminalizes journalism.

As a result, Feroso cannot do his job of effectively reporting on sideshows in Alameda County. Fearing arrest or prosecution under the Ordinance, he is unable to observe, record, and report firsthand at sideshows in the County. The Ordinance compels this self-censorship and

violates Feroso’s First Amendment right to gather and report the news. The dangers of sideshows cannot justify restricting protected speech about them. In fact, those very dangers show why sideshows are a matter of significant public concern. Without firsthand reporting and recordings, County communities lack reliable information with which to advocate for real safety reforms. An order prohibiting enforcement of the Ordinance is necessary to cure the irreparable harm inherent in violating a reporter’s First Amendment right to cover and report on events of public concern occurring in a public place.

III. BACKGROUND

A. Feroso Covers Sideshows in Unincorporated Alameda County, Where Firsthand Reporting and Recording Offer Key Context to Readers.

Feroso is the road safety, transportation, and public health beat reporter for *The Oaklandside*, a nonprofit journalism platform founded in June 2020, committed to rooting its reporting in the needs and wants of diverse communities across the City of Oakland and amplifying community voices. Feroso Decl. ¶ 2. Feroso reports on road safety matters both within Oakland city limits, as well as in parts of unincorporated Alameda County, among other areas, when issues important to Oakland communities arise outside the geographical boundaries of the City. *Id.* ¶ 8. Feroso has regularly reported on sideshows that have occurred in both Oakland and unincorporated Alameda County. *Id.* ¶¶ 10, 15, 17. In the past two years, Feroso has written at least 16 articles that discuss incidents at a sideshow, sideshows generally, or sideshow-prevention measures. *Id.* ¶ 10. Feroso sees his role as neutrally informing Oakland communities on the facts and circumstances of sideshows, so that they are empowered with the knowledge necessary to understand the history of and problems associated with these events and may make fact-based decisions regarding sideshow attendance, policing, and policy reform. *Id.* ¶ 11.

For instance, on May 30, 2023, Feroso published an article in *The Oaklandside* entitled “Map: These Oakland intersections are hotspots for sideshows.” *Id.* ¶ 13 & Ex. 2. In reporting this article, Feroso and his co-author mapped every report of a sideshow made to Oakland police from January 2019 to November 2022. *Id.* As reported in the article, Feroso found that the intersection most frequently taken over by sideshows, according to the reports to police, was

1 Keller Avenue and Skyline Boulevard, with 55 days of sideshow activity reported to police
2 between January 2019 and November 2022. *Id.* ¶ 14 & Ex. 2.

3 The intersection of Keller Avenue and Skyline Boulevard is on the border between the
4 City of Oakland and unincorporated Alameda County. *Id.* ¶ 15. Sideshows occurring at this
5 intersection are visible, within 200 feet, from areas of unincorporated Alameda County. *Id.* Other
6 sideshows Fermoso mapped for the article occurred directly in unincorporated Alameda County,
7 including one day of sideshow activities reported at the intersection of Grass Valley Road and
8 Skyline Boulevard, as well as at 7861 Redwood Road. *Id.* ¶ 17.

9 The public response to Fermoso’s article was substantial. *Id.* ¶ 20. As of or about June 18,
10 2024, this article has been viewed approximately 13,000 times. *Id.* Since the publication of this
11 article, Fermoso has planned to do on-site follow-up reporting on sideshows, due to the high level
12 of community interest in the article and in understanding sideshows. *Id.* ¶ 21. He planned to
13 personally observe, record, and report on the scene of sideshows in Oakland and unincorporated
14 Alameda County, with particular interest in observing, recording, and reporting on sideshows at
15 the most frequently reported intersection of Keller Avenue and Skyline Boulevard. *Id.* ¶ 22.
16 Fermoso planned such observation to include recording and photographing the intersection and
17 sideshow event from all angles, including from unincorporated Alameda County, within 200 feet
18 of the intersection, to best capture images for purposes of newsgathering and reporting. *Id.* Quality
19 audio and visual recordings and photographs are uniquely valuable to journalistic work because
20 they help transport viewers to what is happening on the scene, especially in the context of
21 breaking news. *Id.* ¶ 12.

22 **B. The Ordinance Criminalizes Observing and thus Recording or Reporting on**
23 **Sideshows and Prevents Fermoso from Critical Newsgathering.**

24 On August 1, 2023, the County Board of Supervisors passed the Ordinance, codified at
25 Alameda County Code (“ACC”) § 10.40, which, in relevant part, makes it a criminal offense for
26 “any person to knowingly be a spectator at a sideshow event conducted on a public street or
27 highway or off-street parking facility” and for “any person to knowingly be a spectator at the
28 location of preparations for a sideshow event on a public street or highway or off-street parking

1 facility.” ACC § 10.40.030(A)–(B). “Sideshow” means “an occasion where one or more persons,
 2 for the purpose of performing a street race or reckless driving exhibition for one or more
 3 spectator(s) either blocks or impedes traffic on a street or highway or impedes access to an off-
 4 street parking facility.” ACC § 10.40.020. “Sideshow event” means “a sideshow, street race, or
 5 reckless driving exhibition.” ACC § 10.40.020.

6 “Spectator” means “any person who is present at a sideshow event, or the site of the
 7 preparations for a sideshow event, for the purpose of viewing, observing, watching, or witnessing
 8 the sideshow event as it progresses.” ACC § 10.40.020. “Spectator” may include but is not limited
 9 to “any person at the location of the sideshow event that may have participated in preparations
 10 and/or promoting the sideshow event.” *Id.* A person is “present” at “a sideshow event if that
 11 person is within two hundred (200) feet of the location of the sideshow event, or within two
 12 hundred (200) feet of the site of the preparations for any sideshow event.” ACC § 10.40.020.

13 The Ordinance imposes criminal sanctions, making a violation “a misdemeanor punishable
 14 by imprisonment not exceeding three months or by fine not exceeding one thousand dollars
 15 (\$1,000.00) or by both.” ACC § 10.40.050. By prohibiting being “present” at a sideshow for
 16 purposes of viewing, observing, watching, or witnessing the sideshow, the Ordinance effectively
 17 prohibits recording or reporting on the sideshow, because viewing, observing, watching, or
 18 witnessing an event is inherently necessary to recording or reporting on it. The Ordinance thus
 19 criminalizes journalism about matters of public concern related to sideshows by prohibiting
 20 reporters from the essential newsgathering of observing, recording, or reporting on them from
 21 anywhere within 200 feet of a sideshow or related preparations.

22 Despite Feroso’s plans to observe, record, and report on sideshows in person to expand
 23 upon his prior data-based sideshow reporting, he “canceled all future plans to report on-site at
 24 sideshows in the unincorporated areas of Alameda County” because he reasonably “feared
 25 citation, arrest, and criminal prosecution under the Ordinance” after he learned of its enactment.
 26 Feroso Decl. ¶ 25. Nonetheless, observing, recording, and reporting on these events remains
 27 critical to the dissemination of information to Oakland and Alameda County communities, which
 28

1 facilitates more widespread awareness of sideshows and associated problems, policing, and policy
2 reform. *Id.* ¶ 12.

3 County Board of Supervisors President Nathan A. Miley and Defendant County Sheriff
4 Yesenia Sanchez sent a letter to the County Board of Supervisors on June 6, 2023, that proposed
5 the adoption of this Ordinance. Cappetta Decl. ¶ 2 & Ex. 3. The letter specified that the Ordinance
6 would be targeted at spectators who “take video recordings of these events.” *Id.* The letter also
7 admits that “California law already prohibits drivers and passengers from engaging in Sideshow
8 Events by criminalizing illegal street racing and illegal exhibitions of reckless driving.” *Id.*

9 Existing laws also prohibit the conduct causing alleged problems associated with
10 sideshows that are referred to the Ordinance’s findings, such as the “discharge of firearms,” Cal.
11 Penal Code § 246.3; driving “under the influence of drugs and alcohol,” Cal. Veh. Code § 23152;
12 littering, Cal. Penal Code § 374; “vandalism,” *id.* § 594; “harming or destroying” infrastructure or
13 other property, *id.*; blocking or preventing access, Cal. Veh. Code § 22500; “burning rubber tires,”
14 *id.* § 23109; Cal. Health & Safety Code § 41800; and “noise pollution,” Cal. Penal Code § 415(2).
15 Additionally, other municipalities, including the City of Oakland, have adopted ordinances that
16 prohibit the organizing or facilitating of sideshows without making it unlawful for journalists or
17 others to observe, record, and report on them. *See* Oakland, Cal., Code §§ 10.74.010–10.74.090
18 (2023).

19 **IV. LEGAL STANDARD**

20 To obtain a preliminary injunction, Feroso must show “(1) he is likely to succeed on the
21 merits of his claim, (2) he is likely to suffer irreparable harm absent the preliminary injunction, (3)
22 the balance of equities tips in his favor, and (4) a preliminary injunction is in the public interest.”
23 *Meinecke v. City of Seattle*, 99 F.4th 514, 521 (9th Cir. 2024) (quoting *Baird v. Bonta*, 81 F.4th
24 1036, 1040 (9th Cir. 2023) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).
25 When the government opposes an injunction, the third and fourth factors merge. *Id.*

26 **V. ARGUMENT**

27 On the undisputed facts, Feroso is entitled to a preliminary injunction prohibiting
28 enforcement of the Ordinance against him in his capacity as a reporter. Feroso is likely to

succeed on the merits because the Ordinance violates the First Amendment by imposing a content-based restriction on his protected speech of newsgathering, recording, and reporting on events of public concern in a traditional public forum, and the County has the less restrictive alternative of punishing the unlawful conduct associated with sideshows rather than punishing reporters for exercising their First Amendment rights to observe and record them. Violations of the First Amendment are irreparable harm as a matter of law, and the balance of equities and public interest always favor protecting First Amendment rights.

A. The Ordinance Likely Violates the First Amendment as a Content-Based Restriction on Protected Speech.

The Court must follow “a unique likelihood-of-success standard in First Amendment cases,” under which “the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction on speech.” *Id.* (quoting *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478 (9th Cir. 2022)) (citing *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014)). On the undisputed facts, the Ordinance infringes Feroso’s First Amendment rights, and the County cannot carry its burden to justify restricting his speech in his capacity as a reporter.

1. The Ordinance Restricts Access to a Traditional Public Forum and Effectively Criminalizes the Protected Speech of Newsgathering and Recording or Reporting on Events of Public Concern.

The Ordinance is subject to First Amendment scrutiny because it restricts access to a traditional public forum and effectively criminalizes protected speech in the form of newsgathering and recording and reporting on events of public concern in public places.

By punishing an observer’s presence on “public streets and sidewalks” within 200 feet of a sideshow or related preparations, the Ordinance “restricts access to traditional public fora and is therefore subject to First Amendment scrutiny,” even if it “says nothing about speech on its face.” *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (holding law that established 35-foot buffer zone around reproductive health care facility violated First Amendment). “The protections afforded by

1 the First Amendment are nowhere stronger” than in a traditional public forum. *Berger v. City of*
 2 *Seattle*, 569 F.3d 1029, 1035–36 (9th Cir. 2009) (citations omitted).

3 The Ordinance also inherently criminalizes the protected speech of newsgathering and
 4 recording or reporting on sideshows. Newsgathering must “qualify for First Amendment
 5 protection,” because “without some protection for seeking out the news, freedom of the press
 6 could be eviscerated.” *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Therefore, “newsgathering
 7 is an activity protected by the First Amendment.” *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir.
 8 2012) (quoting *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978)) (citing *Branzburg*,
 9 408 U.S. at 681); *see also Cal. First Amend. Coal. v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998)
 10 (noting the “right of the press to gather news and information is protected by the First
 11 Amendment”).

12 In addition, the acts of making recordings and gathering information are protected by the
 13 First Amendment. “The act of recording is itself an inherently expressive activity,” and because
 14 “the recording process is itself expressive and is ‘inextricably intertwined’ with the resulting
 15 recording, the creation of audiovisual recordings is speech entitled to First Amendment protection
 16 as purely expressive activity.” *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203–04 (9th
 17 Cir. 2018) (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010)); *see*
 18 *also Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (“The First
 19 Amendment protects the right to photograph and record matters of public interest.”) (citations
 20 omitted).

21 By punishing observation of sideshows, the Ordinance necessarily prohibits recording
 22 them, because observing is “a necessary prerequisite to recording.” *Chestnut v. Wallace*, 947 F.3d
 23 1085, 1090 (8th Cir. 2020); *see also Sanchez v. City of Atherton*, No. 22-cv-03106, 2023 U.S.
 24 Dist. LEXIS 3763, *14 (N.D. Cal. 2023) (“[G]iven that the Ninth Circuit protects the recording of
 25 police engaged in official duties, it follows that the act of observing them, which would
 26 necessarily be part of recording them, would also be protected.”). The letter supporting the
 27 Ordinance confirms it is targeted at “video recordings” of sideshows. Cappetta Decl. ¶ 2 & Ex. 3.

1 As the Seventh Circuit confirmed, the “act of *making* an audio or audiovisual recording is
 2 necessarily included within the First Amendment’s guarantee of speech and press rights as a
 3 corollary of the right to disseminate the resulting recording,” and “[b]ecause the First Amendment
 4 protects conduct and activities necessary for expression,” it covers actions “essential to carry out
 5 . . . protected monitoring and recording” of events in public, such as observing them from
 6 sufficient “visual or physical proximity.” *Brown v. Kemp*, 86 F.4th 745, 779 (7th Cir. 2023)
 7 (quoting *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012)).

8 The same is true for observation as a prerequisite to note-taking or other means of
 9 gathering or recording information. Unsurprisingly, “scores of Supreme Court and circuit cases
 10 apply the First Amendment to safeguard the right to gather information as a predicate to
 11 speech. . . . The right to gather information plays a distinctly acute role in journalism. Firsthand
 12 accounts, buttressed by video evidence, enhance accuracy and credibility in reporting and increase
 13 transparency and reader trust, allowing the press ‘to tell more complete and powerful stories.’”
 14 *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed’n, Inc.*, 60 F.4th 815,
 15 829 (4th Cir. 2023) (citations omitted); *see also W. Watersheds Project v. Michael*, 869 F.3d 1189,
 16 1196 (10th Cir. 2017) (“An individual who photographs animals or takes notes about habitat
 17 conditions is creating speech in the same manner as an individual who records a police
 18 encounter.”); *ACLU*, 679 F.3d at 595–96 (noting that “banning photography or note-taking at a
 19 public event would raise serious First Amendment concerns; a law of that sort would obviously
 20 affect the right to publish the resulting photograph or disseminate a report derived from the
 21 notes.”). Because it prohibits protected newsgathering or recording of sideshows located in
 22 traditional public fora, the Ordinance is subject to First Amendment scrutiny.

23 **2. The First Amendment Protects Speech About Unlawful Conduct.**

24 Although sideshows themselves may be illegal, the First Amendment protects speech
 25 about crime, even if it describes or depicts actual crimes. *United States v. Stevens*, 559 U.S. 460,
 26 469 (2010) (while government may enforce “prohibition of animal cruelty itself . . . *depictions* of
 27 animal cruelty” are not excluded “from ‘the freedom of speech’ codified in the First
 28 Amendment”); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105,

1 116–18 (1991) (invalidating law that imposed financial burden on speech about crime); *Winters v.*
 2 *New York*, 333 U.S. 507, 508, 510 (1948) (holding publications “principally made up of criminal
 3 news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed,
 4 lust or crime” were “as much entitled to the protection of free speech as the best of literature”);
 5 *Keenan v. Superior Ct.*, 27 Cal. 4th 413, 428 (2002) (striking down law that imposed financial
 6 burden on speech about crime).

7 Reporting on unlawful conduct informs the debate on whether certain conduct should be
 8 criminal, helps the public evaluate the government’s enforcement policies and practices, and
 9 enables people to protect themselves. *See, e.g., Vice, Illegal Border Crossing in Mexico*, YouTube
 10 (May 31, 2012), <https://perma.cc/7VJF-6SNP>; Daniel González & Gustavo Solis, *A Human*
 11 *Smuggler, and the Wall That Will Make Him Rich*, *Desert Sun* (Sept. 27, 2017),
 12 <https://perma.cc/ME7E-729W>; John Ringer & Meghna Chakrabarti, *The Reality of the Drug Trade*
 13 *in San Francisco*, *WBUR* (Nov. 2, 2022), [https://www.wbur.org/onpoint/2022/11/02/tenderloin-](https://www.wbur.org/onpoint/2022/11/02/tenderloin-reality-of-the-drug-trade-in-san-francisco)
 14 [reality-of-the-drug-trade-in-san-francisco](https://www.wbur.org/onpoint/2022/11/02/tenderloin-reality-of-the-drug-trade-in-san-francisco); Will Kerr, *Thieves Are Using Apple AirTags to Steal*
 15 *Cars. Here’s How to Stop Them*, *By Miles* (June 10, 2022), <https://perma.cc/M8AL-3S7M>.

16 Fermoso’s reporting on sideshows serves these interests. He is a road safety reporter and
 17 sees his role as “neutrally informing Oakland communities on the facts and circumstances of
 18 sideshows,” among other traffic dangers, “so that they are empowered with the knowledge
 19 necessary to understand the history of and problems associated with these events and may make
 20 fact-based decisions regarding sideshow attendance, policing, and policy reform.” Fermoso Decl.
 21 ¶ 11. As Fermoso reported in May 2023, the impact of *The Oaklandside*’s reporting “was reflected
 22 in the budget priorities Councilmembers published last month. For the first time in years, all of
 23 them prioritized traffic safety by asking for barricades at intersections and sidewalks, hardened
 24 medians to stop sideshows, and faster repairs to potholed streets.” Jose Fermoso, *Sharing our*
 25 *reporting on traffic safety and systems with high schoolers*, *Oaklandside* (May 17, 2023, 10:08
 26 AM), [https://oaklandside.org/2023/05/17/sharing-our-traffic-violence-reporting-castlemont-ousd-](https://oaklandside.org/2023/05/17/sharing-our-traffic-violence-reporting-castlemont-ousd-high-school-public-health/)
 27 [high-school-public-health/](https://oaklandside.org/2023/05/17/sharing-our-traffic-violence-reporting-castlemont-ousd-high-school-public-health/). Such reporting makes essential contributions to “the free discussion of
 28 governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

1 The Ordinance prohibits mere presence and observation of sideshows, not any “attempt,
 2 incitement, solicitation, or conspiracy.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).
 3 In doing so, the Ordinance punishes recording or reporting on sideshows, which is protected
 4 speech that cannot be made a crime:

5 News reporting, we can assume, no matter how explicit it is in its description or
 6 depiction of criminal activity, could never serve as a basis for aiding and abetting
 7 liability consistent with the First Amendment. It will be self-evident in the context
 8 of news reporting, if nowhere else, that neither the intent of the reporter nor the
 purpose of the report is to facilitate repetition of the crime or other conduct
 reported upon, but, rather, merely to report on the particular event, and thereby to
 inform the public.

9 *Rice v. Paladin Enters.*, 128 F.3d 233, 266 (4th Cir. 1997).

10 Firsthand observation and recording from bystanders other than reporters are also critical
 11 to inform the public and assist law enforcement in prosecuting crimes that occur at sideshows. For
 12 example, NBC Bay Area recently reported on a sideshow in San Jose, including publishing a still
 13 from a witness’s firsthand recording that depicted a sideshow participant jumping on top of a
 14 police patrol car. Alyssa Goard, *San Jose sideshow near Santana Row injures spectator, police*
 15 *officer*, NBC Bay Area (June 16, 2024), [https://www.nbcbayarea.com/news/local/south-](https://www.nbcbayarea.com/news/local/south-bay/santana-row-sideshow/3568247/)
 16 [bay/santana-row-sideshow/3568247/](https://www.nbcbayarea.com/news/local/south-bay/santana-row-sideshow/3568247/) (last updated June 17, 2024, 4:47 AM). The article reports
 17 that police are working to identify the suspects behind the sideshow to ensure they “are prosecuted
 18 to the fullest extent the law allows” and indicates “San Jose police are asking if anyone has any
 19 video” of “the sideshow to contact them.” *Id.*

20 CBS News Bay Area reported on another June 2024 sideshow at which “[s]tunning video
 21 of the incident showed the dangerous scene on the Embarcadero with cars doing donuts
 22 surrounding a burning vehicle” while others “launch[ed] fireworks into the sky.” Kevin Ko, *San*
 23 *Francisco police chief promises accountability, but so far no arrests in Sunday sideshows*, CBS
 24 News Bay Area (June 11, 2024, 5:59 PM), [https://www.cbsnews.com/sanfrancisco/news/san-](https://www.cbsnews.com/sanfrancisco/news/san-francisco-police-chief-promises-accountability-but-no-arrests-so-far-in-weekend-sideshows/)
 25 [francisco-police-chief-promises-accountability-but-no-arrests-so-far-in-weekend-sideshows/](https://www.cbsnews.com/sanfrancisco/news/san-francisco-police-chief-promises-accountability-but-no-arrests-so-far-in-weekend-sideshows/). San
 26 Francisco Police Department Chief William Scott “urged the public to call 911 if they ever
 27 witness a side show, while also asking witnesses to share videos with police to assist in
 28

1 investigations.” *Id.* Ironically, however, the Ordinance makes it a crime for bystanders to assist
 2 law enforcement in this way.

3 **3. The Ordinance Is a Content-Based Restriction on Speech As It** 4 **Prohibits Recording or Reporting on the Defined Topic of Sideshows.**

5 Under the First Amendment, the government “has no power to restrict expression because
 6 of its message, its ideas, its subject matter, or its content,” and any such restriction is
 7 “presumptively unconstitutional.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting
 8 *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)). That principle “applies with full force in a
 9 traditional public forum.” *McCullen*, 573 U.S. at 477 (citing *Mosley*, 408 U.S. at 95). A law is
 10 content based “on its face” if it “defin[es] regulated speech by particular subject matter.” *Reed*,
 11 576 U.S. at 163. Such a law remains content based regardless of any “innocuous justification” or
 12 “benign motive” the government might have for enacting it. *Id.* at 165–66. “Innocent motives do
 13 not eliminate the danger of censorship presented by a facially content-based statute, as future
 14 government officials may one day wield such statutes to suppress disfavored speech.” *Id.* at 167.

15 The Ordinance inherently “prohibits the recording of a defined topic”—sideshows and
 16 related preparations. *See Animal Legal Def. Fund*, 878 F.3d at 1204. It does not prohibit speech on
 17 other topics at the same time and place, such as architectural photography of a building, aesthetic
 18 photography of a sunset, or any photography, filming, or other speech unrelated to sideshows.
 19 ACC § 10.40.20. Therefore, it is “an ‘obvious’ example of a content-based regulation of speech
 20 because it ‘defin[es] regulated speech by particular subject matter.’” *See id.* (alteration in original)
 21 (quoting *Reed*, 576 U.S. at 163) (citing *Stevens*, 559 U.S. at 468 (holding statute was content
 22 based when it prohibited “visual [and] auditory depiction[s] . . . depending on whether they depict
 23 conduct in which a living animal is intentionally harmed”) (alterations in original)). By
 24 criminalizing recording or reporting on sideshows, the Ordinance imposes a powerful
 25 “disincentive only on speech of a particular subject.” *See Simon & Schuster*, 502 U.S. at 116.

26 Although the Ordinance applies only in specified locations, ACC § 10.40.030, it is not
 27 purely “location-based” or “agnostic as to content.” *City of Austin v. Reagan Nat’l Advert. of*
 28 *Austin, LLC*, 596 U.S. 61, 69 (2022). Instead, it is content based because it singles out “specific

subject matter for differential treatment” by punishing the observing and recording of sideshows but not, for example, sunsets, buildings, or other landmarks or events. *Id.* (quoting *Reed*, 576 U.S. at 169); ACC § 10.40.20 (defining a “spectator” as a person present at a sideshow event “*for the purpose of viewing, observing, watching, or witnessing the sideshow event*”) (emphasis added).

A law that targets speech based on topic or subject matter remains content based notwithstanding that it has a limited geographic scope. *Carey v. Brown*, 447 U.S. 455, 460–61 (1980) (holding that statute prohibiting residential picketing except for labor disputes was “based upon the content of the demonstrator’s communication”); *Mosley*, 408 U.S. at 95 (holding that ordinance restricting picketing near schools except for labor disputes was content based because it “describes permissible picketing in terms of its subject matter”). Thus, the Ordinance is a content-based restriction on speech.

4. The Ordinance Fails Strict Scrutiny Because the County May Punish the Unlawful Conduct of Engaging in a Sideshow Without Restricting Protected Speech About Sideshows.

“Content-based restrictions on speech are subject to strict scrutiny and may only be upheld if they are the least restrictive means available to further a compelling government interest.” *Askins*, 899 F.3d at 1044 (citation and quotation marks omitted). “The least-restrictive-means standard is exceptionally demanding.” *Holt v. Hobbs*, 574 U.S. 352, 364 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)). “If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000) (citation omitted). “Even if a state intends to advance a compelling government interest, we will not permit speech-restrictive measures when the state may remedy the problem by implementing or enforcing laws that do not infringe on speech.” *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020) (citations omitted).

While the County may have a compelling interest in preventing hazards caused by sideshows, it has the less restrictive alternative of punishing the unlawful conduct associated with such events rather than punishing reporters or others for exercising their First Amendment right to observe and record them. Therefore, the Ordinance fails strict scrutiny. *Animal Legal Def. Fund*, 878 F.3d at 1204–05 (holding content-based law which prohibited “recording of a defined topic”

1 on private property failed strict scrutiny where “owners can vindicate their rights” through
 2 enforcing other laws).

3 As the County has acknowledged, “California law already prohibits drivers and passengers
 4 from engaging in Sideshow Events by criminalizing illegal street racing and illegal exhibitions of
 5 reckless driving.” Cappetta Decl. ¶ 2 & Ex. 3. Other laws also prohibit the “discharge of firearms,”
 6 Cal. Penal Code § 246.3; driving “under the influence of drugs and alcohol,” Cal. Veh. Code. §
 7 23152; littering, Cal. Penal Code § 374; “vandalism,” *id.* § 594; “harming or destroying”
 8 infrastructure or other property, *id.*; blocking or preventing access, Cal. Veh. Code § 22500;
 9 “burning rubber tires,” *id.* § 23109; Health & Safety Code § 41800; and “noise pollution,” Penal
 10 Code § 415(2).

11 In addition, the County may adopt a law that targets sideshows directly without punishing
 12 protected speech. For example, the City of Oakland adopted an ordinance prohibiting the
 13 organizing or facilitating of sideshows without making it unlawful for journalists or others to
 14 observe, record, and report on them. *See* Oakland, Cal., Code §§ 10.74.010–10.74.090.

15 The County thus has readily available alternatives to address any dangerous conduct,
 16 because “the penal laws” can be “used to punish such conduct directly” rather than punishing
 17 reporters or others for engaging in protected speech. *Comite de Jornaleros de Redondo Beach v.*
 18 *City of Redondo Beach*, 657 F.3d 936, 950 (9th Cir. 2011) (quoting *Village of Schaumburg v.*
 19 *Citizens for a Better Env’t*, 444 U.S. 620, 637 (1980)). Because the County has “several less
 20 speech-restrictive alternatives to achieve public safety,” the Ordinance violates the First
 21 Amendment. *Meinecke*, 99 F.4th at 525.

22 Experience shows that such alternatives can be effective. For example, San Diego police
 23 recently prevented “a coordinated event at multiple intersections,” arresting the alleged
 24 coordinator “on suspicion of conspiracy to commit felony vandalism, exhibition of speed, reckless
 25 driving, facilitating an exhibition of speed and obstructing arrest.” Caleb Lunetta, *Street Takeover*
 26 *Events Involving 200 People Thwarted Throughout San Diego Last Weekend*, San Diego Union-
 27 Tribune (June 5, 2024, 8:08 PM), [https://www.sandiegouniontribune.com/news/public-](https://www.sandiegouniontribune.com/news/public-safety/story/2024-06-05/street-takeover-events-san-diego)
 28 [safety/story/2024-06-05/street-takeover-events-san-diego](https://www.sandiegouniontribune.com/news/public-safety/story/2024-06-05/street-takeover-events-san-diego) (last updated June 6, 2024, 12:23 AM).

1 Earlier this year, officers “seized 13 vehicles and arrested two people on suspicion of participating
 2 in illegal street takeover ‘sideshow’ events.” Karen Kucher, *Officers Seize 13 Vehicles, Arrest 2 in*
 3 *Connection with Street Takeover ‘Sideshows’ in San Diego*, San Diego Union-Tribune (May 2,
 4 2024, 8:30 PM), [https://www.sandiegouniontribune.com/news/public-safety/story/2024-05-](https://www.sandiegouniontribune.com/news/public-safety/story/2024-05-02/officers-seize-vehicles-street-takeover-sideshows)
 5 [02/officers-seize-vehicles-street-takeover-sideshows](https://www.sandiegouniontribune.com/news/public-safety/story/2024-05-02/officers-seize-vehicles-street-takeover-sideshows) (last updated May 3, 12:30 AM). Around
 6 Labor Day in 2022, “officers arrested 11 people and cited 51 involved with the events,” and
 7 recently, “officers were able to prevent a group from putting on two sideshows after catching word
 8 the events were being planned.” *Id.*; see also David Hernandez, *11 Arrested, 51 Cited During*
 9 *Street Takeovers in San Diego, Spring Valley*, San Diego Union-Tribune (Sept. 6, 2022, 8:45 PM),
 10 [https://www.sandiegouniontribune.com/news/public-safety/story/2022-09-06/11-arrested-52-](https://www.sandiegouniontribune.com/news/public-safety/story/2022-09-06/11-arrested-52-cited-during-street-takeovers-in-san-diego-spring-valley)
 11 [cited-during-street-takeovers-in-san-diego-spring-valley](https://www.sandiegouniontribune.com/news/public-safety/story/2022-09-06/11-arrested-52-cited-during-street-takeovers-in-san-diego-spring-valley) (last updated Sept. 7, 12:45 AM).

12 As these examples show, the proper response to unlawful conduct is to take action against
 13 those “who actually engage in such conduct, rather than to suppress legitimate First Amendment
 14 conduct as a prophylactic measure.” *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817,
 15 834 (9th Cir. 2020) (quoting *Collins v. Jordan*, 110 F.3d 1363, 1373 (9th Cir. 1996)); see also,
 16 e.g., *IMDb.com*, 962 F.3d at 1123 (“Rather than restrict truthful speech, the typical ‘method of
 17 deterring unlawful conduct is to impose an appropriate punishment on the person who engages in
 18 it.’”) (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001)).

19 Perhaps it might be easier to enforce a 200-foot perimeter against anyone observing or
 20 recording a sideshow than to arrest and prosecute individuals who are driving unlawfully or
 21 committing other crimes, but the First Amendment does not permit laws restricting speech simply
 22 because they are easier to enforce. *McCullen*, 573 U.S. at 495 (striking down buffer zone and
 23 noting that “[a] painted line on the sidewalk is easy to enforce, but the prime objective of the First
 24 Amendment is not efficiency.”).

25 Therefore, “it does not matter” whether the Ordinance might “accomplish what it sets out
 26 to do” by deterring speech about sideshows, because an “unconstitutional statute that could
 27 achieve positive societal results is nonetheless unconstitutional.” *IMDb.com*, 962 F.3d at 1128
 28 (citations omitted). The County may not invoke the Ordinance’s effect in suppressing speech

1 about sideshows as the interest justifying the Ordinance, because “this sort of circular defense can
 2 sidestep judicial review of almost any statute” and “[e]very content-based discrimination could be
 3 upheld by simply observing that the state is anxious to regulate the designated category of
 4 speech.” *Simon & Schuster*, 502 U.S. at 120.

5 Although the government “may pass valid laws” prohibiting certain conduct, the “prospect
 6 of crime . . . by itself does not justify laws suppressing protected speech,” and the “government
 7 may not prohibit speech” on the asserted ground that “it increases the chance an unlawful act will
 8 be committed ‘at some indefinite future time.’” *Free Speech Coal.*, 535 U.S. at 245, 253 (quoting
 9 *Hess v. Indiana*, 414 U.S. 105, 108 (1973)); *cf. Bartnicki*, 532 U.S. at 529–30 (noting “it would be
 10 quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed
 11 in order to deter conduct by a non-law-abiding third party.”).

12 The Ordinance also fails strict scrutiny because it is both “seriously underinclusive” and
 13 “seriously overinclusive.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 805 (2011). It is seriously
 14 underinclusive because it does not reach observing or recording sideshows by the participants or
 15 drivers themselves, nor does it reach observing or recording by remote means from more than 200
 16 feet away, such as by use of a drone. It is seriously overinclusive because it prohibits observing,
 17 recording, or reporting on sideshows that has nothing to do with allegedly promoting or
 18 encouraging them, such as covering them in the media, protesting them, reporting them to law
 19 enforcement, or otherwise petitioning the government to take action. Accordingly, the Ordinance
 20 fails the strict scrutiny that applies to content-based restrictions on speech, and Feroso is likely
 21 to prevail on his claim that the Ordinance violates the First Amendment as applied to him as a
 22 reporter covering sideshows.

23 **B. Feroso Is Suffering Irreparable Harm, and the Balance of Equities and**
 24 **Public Interest Favor an Injunction Protecting His First Amendment Rights.**

25 Feroso is suffering irreparable harm because any “loss of First Amendment freedoms
 26 constitutes an irreparable injury” as a matter of law. *Meinecke*, 99 F.4th at 526; *see also, e.g.,*
 27 *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 694
 28 (9th Cir. 2023) (“It is axiomatic that ‘[t]he loss of First Amendment freedoms, for even minimal

1 periods of time, unquestionably constitutes irreparable injury.”) (quoting *Roman Cath. Diocese v.*
 2 *Cuomo*, 592 U.S. 14, 19 (2020)); *Am. Beverage Ass’n v. City & County of San Francisco*, 916
 3 F.3d 749, 758 (9th Cir. 2019) (en banc) (“Because Plaintiffs have a colorable First Amendment
 4 claim, they have demonstrated that they likely will suffer irreparable harm.”).

5 “The balance of equities and public interest favor” an injunction because “[i]t is always in
 6 the public interest to prevent the violation of a party’s constitutional rights” and when a party
 7 raises “serious First Amendment questions, that alone compels a finding that the balance of
 8 hardships tips sharply in [its] favor.” *Meinecke*, 99 F.4th at 526 (citation and quotation marks
 9 omitted). Although the government “has an interest in maintaining public order,” even
 10 “undeniably admirable goals . . . must yield” to the Constitution, especially when the County has
 11 “other means of vindicating its interests without restricting [Fermoso’s] speech.” *Id.*

12 **C. No Bond Should be Required.**

13 The Court has discretion “as to the amount of security required, *if any*,” under Federal Rule
 14 of Civil Procedure 65(c), and it “may dispense with the filing of a bond when it concludes there is
 15 no realistic likelihood of harm to the defendant from enjoining his or her conduct.” *Johnson v.*
 16 *Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (citation and quotation marks omitted). It is proper
 17 to waive the bond requirement in free speech cases, because “to require a bond would have a
 18 negative impact on plaintiff’s constitutional rights, as well as the constitutional rights of other
 19 members of the public.” *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 738 (C.D.
 20 Cal. 1996) (citation omitted).

21 The County would incur no compensable costs or damages even if the injunction were
 22 later dissolved. Parties may not recover attorney fees arising from issuance of an injunction. *Bass*
 23 *v. First Pac. Networks, Inc.*, 219 F.3d 1052, 1055–56 (9th Cir. 2000). Therefore, no bond should
 24 be required. *Gorbach v. Reno*, 219 F.3d 1087, 1092 (9th Cir. 2000) (upholding denial of bond in
 25 absence of any costs or damages suffered by the government arising from a wrongful injunction);
 26 *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX, 2011 U.S. Dist. LEXIS 128294, at
 27 *19 (D. Ariz. Nov. 3, 2011) (waiving bond in First Amendment case because it is “difficult to
 28 envision how Defendants would incur compensable costs or damages”); *Bible Club v. Placentia-*

1 *Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291, 1302 n.6 (C.D. Cal. 2008) (“Given that this case
 2 involves the probable violation of the Bible Club’s First Amendment rights, and that the damages
 3 to the District of issuing this injunction seem minimal, if they exist at all, the Bible Club need not
 4 post a bond.”). Accordingly, the Court should require no bond in this case.

5 **VI. CONCLUSION**

6 For the foregoing reasons, Feroso respectfully requests that the Court grant his motion
 7 for a preliminary injunction prohibiting the County from enforcing the Ordinance against him for
 8 observing, recording, or reporting on sideshows or related preparations in his capacity as a
 9 reporter.

10 Dated: July 23, 2024

11 FIRST AMENDMENT COALITION

12 By

/s/ David Loy

13 DAVID LOY

14 ANN CAPPETTA

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